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June 23, 1999

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II
445-12th Street, S.W.
Washington, DC 20554

Re: Department of Justice/Federal Bureau of Investigation Petition For Reconsideration, filed March 31, 1999, CC Docket No. 97-213

Dear Ms. Roman Salas:

On March 31, 1999, the Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI") filed a Petition for Reconsideration ("PFR") of the March 2, 1999 Order of the Office of Engineering and Technology ("OET").[1]

The OET Order challenged by the DOJ/FBI granted the requests of five telecommunications equipment manufacturers for confidential treatment of cost data submitted in the above-referenced Communications Assistance for Law Enforcement Act ("CALEA") proceeding. In its PFR, the DOJ/FBI -- claiming advocacy consistent with Congressional intent -- presses the totally incredible and logically erroneous argument that "cost considerations are not central to [the] task" of "identif[ing] the specific communications assistance capabilities that CALEA

requires and to correct deficiencies in the industry standard that would otherwise provide a 'safe harbor' under [Section] 107(a)(2)."[2]

The DOJ/FBI is incorrect. U S WEST has previously commented on the critical relevance of costs to CALEA implementation. A copy of those comments including our analysis on this issue is attached hereto as Attachment A and is incorporated herein by this reference.[3] More recently, U S WEST filed comments in response to the Public Notice issued by the OET regarding revenue estimates submitted by the manufacturers. In those comments, attached hereto as Attachment B and incorporated herein by this reference, U S WEST repeated its position that the Commission should reject the proposed "punch list" capabilities because they cost too much and therefore fail to satisfy the criteria in Section 107(b) of CALEA.[4]

It its comments, U S WEST argued that the aggregate figures published by OET demonstrated cost and revenue impacts far in excess of anything envisioned by Congress, even without the punch list capabilities.[5] Their inclusion only drives the

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[1] Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, Public Notice, Report No. 2330, rel. May 28, 1999. 64 Fed. Reg. 30519, rel. June 8, 1999.

[2] DOJ/FBI PFR at 3-4.

[3] See Attachment A, Reply of U S WEST, Inc., filed Jan. 27, 1999.

[4] See Attachment B, Comments of U S WEST, Inc., filed May 17, 1999.

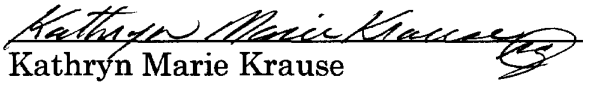
[5] See id.

cost/revenue impacts up higher, to the almost certain detriment of citizens across the country. How such cost information, and the implications associated with out-of-sight CALEA implementation costs for the American public, can be argued as irrelevant is mystifying. Any such argument is clearly erroneous.

Please see that this letter is associated with the recent Public Notice on the DOJ/FBI Petition. In conclusion, costs are central to any CALEA implementation discussion and the DOJ/FBI are wrong in their arguments to the contrary.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.



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Of Counsel,
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June 23, 1999

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC. 20554

In the Matter of:	)	
	)	
Communications Assistance for	)	CC Docket No. 97-213
Law Enforcement Act	)	

REPLY OF U S WEST, INC.

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January 27, 1999

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SUMMARY

The comments demonstrate that the Commission should exclude the punch list capabilities from any safe harbor standard it establishes under section 107(b) of CALEA. DOJ/FBI has not demonstrated that those capabilities are within the scope of section 103(a), and that fact alone justifies excluding the capabilities from the safe harbor standard. The Commission likewise should exclude the location information and packet data capabilities included in J-STD-025.

The Commission also should reject the disputed capabilities because DOJ/FBI has neither produced the cost data that it possesses nor carried its burden of showing that each capability satisfies the criteria of section 107(b). The Commission is not only authorized but obligated to exclude capabilities from the safe harbor standard if their costs are excessive, and the Commission cannot resolve that issue without DOJ/FBI's data. Any concern about DOJ/FBI's legal authority to disclose its data can be addressed by requiring DOJ/FBI to aggregate the data for each individual punch list capability.

Finally, the comments demonstrate that manufacturers and carriers will need substantial time to develop and install solutions if the Commission revises the requirements of J-STD-025. The Commission should give carriers at least 18 months after such solutions become commercially available to comply with the Commission's decision.

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FEDERAL COMMUNICATIONS COMMISSION
Washington, DC. 20554

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Law Enforcement Act	)	

REPLY OF U S WEST, INC.

The comments filed in this proceeding demonstrate that the Commission should exclude the punch list capabilities from any standard established pursuant to section 107(b) of CALEA. The Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI") have not shown that the punch list capabilities are required by section 103(a), and the Commission should reject those capabilities for that reason alone. The Commission likewise should exclude the location information and packet data capabilities included in J-STD-025.

In addition, the Commission should reject all the disputed capabilities because DOJ/FBI has not produced relevant cost data in its possession and has failed to carry its burden of showing that each capability satisfies the criteria of section 107(b). The Commission is not only authorized but obligated to exclude capabilities from the safe harbor standard if their costs are excessive, and it cannot determine that issue without DOJ/FBI's data. Any concern about DOJ/FBI's legal authority to disclose its cost data to the Commission and the parties in this proceeding can be addressed by requiring DOJ/FBI to aggregate the data for each individual punch list capability.

Finally, the comments demonstrate that manufacturers and carriers will need a significant amount of time to develop and install solutions based on any modifications that the

Commission makes to J-STD-025. The Commission therefore should guarantee that carriers have at least 18 months after such solutions become commercially available in order to comply with the Commission's decision.

I. THE COMMENTS CONFIRM THAT NONE OF THE DISPUTED CAPABILITIES FALLS WITHIN SECTION 103.

The comments reflect consensus that DOJ/FBI's proposed modifications to J-STD-025 fall outside section 103(a). If the Commission nevertheless includes any of the punch list capabilities in its safe harbor standard, it should define each such capability with precision. Throughout the standard-setting process, law enforcement has presented industry with vague and often shifting demands. Therefore, to avoid unnecessary disputes and hasten CALEA compliance, the Commission should make its decisions as to each requested capability as specific as possible, including examples and hypothetical call scenarios where appropriate.[1/]

A. Content of subject-initiated conference calls

As U S WEST demonstrated in its comments, this capability — to intercept subject-initiated conference calls after the subject has dropped off — goes beyond the scope of section 103(a).[2/] In any event, as other parties have urged,[3/] the Commission should expressly exclude "Meet Me" conference calling from this capability. The FNPRM correctly concluded that a carrier does not have to provide access to conference calls "[f]or those configurations . . .

1/ *See* TIA Comments at 16-17. At the same time, the Commission should be careful not to delve into specific technical requirements, which can be developed more effectively and efficiently by the experts at Subcommittee TR45.2.

2/ *See* U S WEST Comments at 11-14.

3/ *See* Ameritech Comments at 6-7; AT&T Comments at 7-8; CTIA Comments at 25-26; *see also* EPIC/EFF/ACLU Comments at 21.

in which, when the subscriber drops off the call . . . the 'equipment, facilities, or services of a subscriber' are no longer used to maintain the conference call."[4/] "Meet Me" conference calling is just such a configuration. When providing that service, a carrier establishes a "conference bridge" that allows any person to join a conference call on demand. Once the intercept subject drops off a "Meet Me" conference call arranged by another person, "equipment, facilities, or services" of the intercept subject are no longer used. And where the intercept subject has ordered the conference bridge and then drops off, law enforcement lacks authority under Title III to monitor any continuing conversations.[5/] Thus, providing access to conversations after an intercept subject has dropped off the call would violate CALEA.

The Commission also should clarify that the capability to intercept conversations on a conference call, thus limited, must be provided only to the extent that law enforcement orders enough channels to monitor the covered conversations.[6/] Carriers cannot be expected to know how many channels should be set aside for surveillance, and the burden therefore should be on law enforcement to notify carriers and obtain sufficient channels in advance.

B. Party hold, join, drop on conference calls

The comments demonstrate that the information DOJ/FBI seeks through this capability is not "call-identifying information" under CALEA.[7/] In the first place, the terms

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4/ FNPRM ¶ 78. J-STD-025 provides for interception while the intercept subject is on the call.

5/ *See* U S WEST Comments at 12.

6/ *See* AT&T Comments at 7.

7/ *See* AirTouch Comments at 16; Ameritech Comments at 7; AT&T Comments at 8-1; Bell Atlantic Comments at 8-9; BellSouth Comments at 13-15; CTIA Comments at 26-28; (continued...)

"origin," "direction," "destination," and "termination" have physical, not temporal, meanings.[8] And to the extent the Commission has used these terms elsewhere, it has treated them as referring to physical locations in the network, often denominated by the phone numbers associated with a communication.[9] Basic norms of statutory construction require the Commission to give each of those four terms a fixed definition and then apply those definitions consistently when fashioning its safe harbor standard.[10] For example, because the Commission

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7/ (...continued)
EPIC/EFF/ACLU Comments at 24-26; Nextel Comments at 7-9; PCIA Comments at 25-27; SBC Comments at 12-13; TIA Comments at 29; USTA Comments at 14-15.

8/ *See* U S WEST Comments at 14-17; *see also* Bell Atlantic Comments at 8 ("The words 'the origin, direction, destination, or termination' in section 102(2) plainly have physical meanings, that is, they refer to places or locations in the network — this is information that, as the report explains, is used for routing calls. These words do not have the 'temporal' meanings that the Commission suggests for them.").

9/ *See, e.g., Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8108-09 ¶ 61 (1998) ("Much CPNI . . . consists of highly personal information, particularly relating to call destination, including the numbers subscribers call and from which they receive calls . . . ."); *Telephone Number Portability*, CC Docket No. 95-116, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12351 ¶ 1 (1995) ("A telephone number generally identifies the specific telecommunications customer being called, as well as the termination point of the call."); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571, 7635 n.257 (1991) ("No indication of the origin of a call is currently transmitted on interLATA calls except where Automatic Number Identification (ANI) is transmitted.").

10/ *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a single formulation . . . the same way each time it is called into play.") (citation omitted); *United States v. Nippon Paper Industries Co.*, 109 F.3d 1, 5-6 (1st Cir. 1997) ("[T]he same phrase, appearing in the same portion of the same statute, cannot bear divergent interpretations in different litigation contexts.").

interprets "origin" in other circumstances to mean the *telephone number* from which a call comes, "origin" cannot now be interpreted to mean the *time* when a call begins.

This approach also is consistent with Congress's understanding of call-identifying information. CALEA's legislative history makes clear that Congress, in obligating carriers to provide that information, intended to require the provision only of telephone numbers to law enforcement.[11/] Limiting call-identifying information to telephone numbers also would give effect to Congress's desire not to expand the types of information available to law enforcement through CALEA. When Congress passed CALEA, law enforcement was permitted to obtain only telephone numbers by means of a pen register.[12/] The party hold/join/drop capability would provide entirely new and different information.

C. Subject-initiated dialing and signaling information

The comments show that the subject-initiated dialing and signaling information encompassed by this capability would provide information never before available to law enforcement, contrary to Congress's purpose in adopting CALEA.[13/] Moreover, flash hook and

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11/ *See* H.R. Rep. No. 103-827, pt. 1, at 16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3496 (stating that CALEA requires carriers to "[i]solate expeditiously information identifying the originating and destination numbers of targeted communications"); *id.* at 21, *reprinted in* 1994 U.S.C.C.A.N. at 3501 ("The term 'call-identifying information' means the dialing or signaling information generated that identifies the origin and destination or [sic] a wire or electronic communication.").

12/ DOJ/FBI admits that it has not in the past been able to "obtain information that a particular participant was placed on hold during, or dropped from, a multi-party call." Joint Petition for Expedited Rulemaking, filed by DOJ and FBI, Mar. 27, 1998, at 44 ("*DOJ/FBI Deficiency Petition*").

13/ *See* AirTouch Comments at 17-19; Ameritech Comments at 7; BellSouth Comments at 15-17; CTIA Comments at 28-30; EPIC/EFF/ACLU Comments at 25-26; PCIA Comments at 27-28; SBC Comments at 13-14; TIA Comments at 30-32; USTA Comments at (continued...)

key usage information associated with a subscriber is not call-identifying information, because it does not indicate the "origin, direction, destination, or termination." Nor does notice of an intercept subject's activation of forwarding service — which occurs before any individual call has been forwarded — constitute call-identifying information. Such activation does not indicate the "origin, direction, destination, or termination" of any communication, because no such communication has taken place.[14/] Notice of activation may help law enforcement determine an intercept subject's *future* whereabouts, but CALEA was intended only to preserve law enforcement's ability to intercept communications, not to be an all-purpose investigative and evidentiary tool for law enforcement.

D. Timing information

The comments demonstrate that requiring call-identifying information to be provided within three seconds and with time stamps accurate to 100 milliseconds is not feasible.[15/] Indeed, DOJ/FBI has not even tried to justify those requirements in terms of feasibility or cost.

TIA suggests that manufacturers could provide call-identifying information within 8 seconds with 95 percent probability and that time stamps could be accurate to 200 milliseconds.[16/] BellSouth and CTIA mention a growing "consensus" on timing information

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13/ (...continued)
15-16.

14/ *See* AirTouch Comments at 17; CTIA Comments at 29.

15/ *See* AirTouch Comments at 21-22; SBC Comments at 15; TIA Comments at 36; USTA Comments at 16.

16/ *See* TIA Comments at 35-37.

within the ESS ad hoc group.[17] However, TIA's suggestion differs from proposals that have been discussed within the ESS project.[18] And the comments of BellSouth and CTIA are premature. ESS specified certain timing parameters as a baseline text, but that serves only as a starting point for further comment and refinement. Furthermore, the ESS discussions have always been premised on the assumption that the standards adopted there would be voluntary — not mandatory — means for carriers to provide electronic surveillance assistance to law enforcement.

In short, the Commission should leave the development of any such requirements to the experts at Subcommittee TR45.2. In any event, providing call-identifying information within an 8-second limit is feasible only to the extent that such information is reasonably available at the switch operating as the intercept access point ("IAP"). In fact, where the dialing and signaling information is at the IAP, it can be delivered to law enforcement almost instantaneously. However, in some instances, U S WEST now uses technologies for which the relevant information is not accessible at the IAP, so that U S WEST cannot reliably provide call-identifying information in the time frame contemplated by TIA.

For these reasons, the Commission should not impose any obligations on carriers with respect to timing and date stamps. At most, the Commission should direct carriers to comply with the standard ultimately adopted by Subcommittee TR45.2.

17/ *See* BellSouth Comments at 18; CTIA Comments at 32.

18/ ESS discussions have been suspended pending the outcome of this proceeding.

E. Dialed digit extraction

It is clear from the comments that post-cut-through digits are not call-identifying information or "reasonably available" to originating carriers.[19/] From the perspective of such a carrier, post-cut-through digits are simply call content.

Moreover, law enforcement does not need the dialed digit extraction capability to obtain post-cut-through digits. As DOJ/FBI admits, law enforcement currently uses a pen register to "receive access to all signals transmitted over a subscriber's line on the local loop, including call content as well as dialing and signaling information," and then employs a tone decoder "to record and decode the dialing and signaling information utilized in call processing . . . without recording or disclosing the call content."[20/] J-STD-025 would allow law enforcement to continue using this same method to obtain post-cut-through digits: Law enforcement agencies could order call content channels and attach their tone decoders to receive such information.[21/]

In seeking to force carriers to provide post-cut-through digits, DOJ/FBI would simply shift from law enforcement to carriers the substantial cost of providing the large numbers of tone decoders needed to extract dialed digits.[22/] Congress, however, did not enact CALEA to relieve law enforcement of its existing surveillance expenses. Furthermore, DOJ/FBI's proposed

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19/ *See* AT&T Comments at 19; Bell Atlantic Comments at 9; EPIC/EFF/ACLU Comments at 26-33; Nextel Comments at 18; PCIA Comments at 33; SBC Comments at 17-18; TIA Comments at 40-43; USTA Comments at 17-18.

20/ DOJ/FBI Comments at 79-80.

21/ *See* Ameritech Comments at 12-13; BellSouth Comments at 18-19; CTIA Comments at 37; USTA Comments at 18.

22/ *See, e.g.*, AirTouch Comments at 27; AT&T Comments at 20-21; Bell Atlantic Mobile Comments at 11-12; CTIA Comments at 33-37; TIA Comments at 40-43.

capability cannot be considered a "cost-effective" means of meeting the requirements of section 103(a), because forcing carriers to redesign their networks is clearly more expensive than simply requiring law enforcement agencies to continue using their own tone decoders, which already are deployed and commercially available.[23/]

F. In-band and out-of-band signaling

DOJ/FBI continues to argue that in-band and out-of-band signaling is "call-identifying information," because it "identifies the 'termination' (and, in some instances, the 'direction' or 'destination') of a communication."[24/] But the specific types of information sought by DOJ/FBI — (1) in-band signals that are audible to a subscriber (such as busy signals), and (2) out-of-band signals sent to a subscriber's terminal indicating an incoming call or message (such as a signal to ring the subscriber's phone or a signal containing alphanumeric Caller ID information)[25/] — reveal the flaw in its argument. Neither type of signaling information constitutes call-identifying information, because neither provides law enforcement with telephone numbers.[26/]

Nor would broader definitions of call-identifying information capture such signaling. For example, even if "termination" were defined as making the final connection necessary for a communication or the ending of a communication, as the Commission suggested

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23/ *See* Ameritech Comments at 12-13; BellSouth Comments at 18.

24/ *See* DOJ/FBI Comments at 53.

25/ *Id.*

26/ *See* Part II.B, *supra*. A Caller ID message might indicate the telephone number from which a call is coming, but J-STD-025 already provides that information to law enforcement. *See* J-STD-025 § 5.4.5. What DOJ/FBI is demanding here is not the incoming telephone number itself, but a message indicating that the intercept subject *knows* that number.

in the FNPRM,[27] none of the requested signals would indicate such an event. Indeed, the signaling requested by DOJ/FBI generally would occur *prior* to any communications between parties.[28] This capability therefore clearly exceeds the scope of CALEA.

G. Surveillance status/Continuity check tone

DOJ/FBI would force carriers to take "affirmative steps to monitor the integrity of authorized electronic surveillance."[29] But the comments support the Commission's tentative conclusion that section 103 requires a carrier to "ensure" only that its network is "capable" of providing call content and call-identifying information, not "that such capability be proven or verified on a continual basis."[30] Moreover, as the comments demonstrated, carriers have provided in the past — and will continue to provide — reliable surveillance service to law enforcement without this capability.[31]

H. Feature status

The comments strongly support the Commission's tentative conclusion that this capability is neither required by section 103(a) nor cost-justified under section 107(b).[32]

27/ *See* FNPRM at ¶ 85 (stating that "party drop" information appears to identify "the termination of a communication").

28/ *See* TIA Comments at 34.

29/ DOJ/FBI Comments at 60.

30/ FNPRM at ¶ 109; *see also* AT&T Comments at 15; CTIA Comments at 33; Nextel Comments at 15-17; PCIA Comments at 19; TIA Comments at 37-38.

31/ *See* AT&T Comments at 16-17; Nextel Comments at 15-17; U S WEST Comments at 21-23.

32/ *See* AirTouch Comments at 24-25; Ameritech Comments at 10; AT&T Comments at 17-18; CTIA Comments at 33; Nextel Comments at 17; SBC Comments at 17; TIA Comments at 39-40.

I. Location information

As U S WEST showed in its comments, this capability is beyond the scope of section 103. "Location" is not called for by the definition of "call-identifying information," and section 103(a)(2)'s exclusion of location information means that CALEA does not require carriers to provide such information under *any* circumstances.[33/] Moreover, the words "origin" and "destination" should be given the same meanings in both the wireline and wireless contexts.[34/] If CALEA requires that carriers provide only telephone numbers for the "origin" and "destination" of a wireline communication, it requires no more and no less for wireless communications. The fact that *law enforcement* may be able to decipher a location from a telephone number in the wireline context provides no basis for requiring *wireless carriers* to provide that information.[35/]

II. THE COMMENTS DEMONSTRATE THAT THE COMMISSION SHOULD NOT IMPOSE ANY NEW BURDENS ON PACKET DATA TECHNOLOGY AT THIS TIME.

The comments strongly support U S WEST's proposal that the Commission not impose *any* new regulatory burdens on packet-mode communications at this time. AirTouch and Bell Atlantic Mobile expressly advocate excluding all packet-mode communications from the Commission standard,[36/] while other commenters urge the exclusion of particular types of packet

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33/ *See* U S WEST Comments at 24-26.

34/ *See* CDT Comments at 5-8.

35/ *See* EPIC/EFF/ACLU Comments at 17-18.

36/ *See* AirTouch Comments at 32-34; Bell Atlantic Mobile Comments at 12-13.

services.[37] Commenters also highlighted the dangers of imposing regulatory obligations on an evolving technology such as packet communications.[38] The Commission should impose CALEA obligations on packet-communications, if at all, only after packet data technologies have had a chance to mature and after the Commission conducts new notice-and-comment proceedings focused on these issues.

Nor should the Commission require, as CDT proposes, that carriers separate packet headers from packet content. Although CDT has sought to narrow its proposal, it still fails to appreciate the difficulty of providing even that scaled-down capability. Separating call-identifying information from content in packet-mode communications would involve two steps: (i) *scanning* packet data streams to identify the packets that are associated with an intercept subject, and (ii) *extracting* call-identifying information from those packets by deciphering the various layered protocols embedded in the packet.[39] Under CDT's revised proposal, carriers would have to extract headers only from those "packet protocols within the OSI reference model layers for which they are responsible."[40]

37/ *See* AT&T Comments at 25-26; Metricom Comments at 4; TIA Comments at 6, 43 n.105.

38/ *See* AirTouch Comments at 32-34 & n.52; AT&T Comments at 25; Bell Atlantic Comments at 12-14; Bell Atlantic Mobile Comments at 12-13; PCIA Comments at 17-18; SBC Comments at 7-9; TIA Comments at 43-47; USTA Comments at 11-13.

39/ *See* TIA Comments at 46-47.

40/ CDT Comments at 29.

This approach still would not be technically feasible. First, CDT itself admits that identifying the packets to be intercepted "poses . . . problems."[41] That is an understatement. It would require carriers to "'watch' all circuits, all the time, looking for specific packets" — an obligation that would be "very processor-intensive, adversely impacting the other network packet functions that the processors perform."[42]

Second, it would be very difficult for a carrier to determine from where in the network it could even extract header information sought under a pen register order. As CDT acknowledges, the header information available to a carrier at most points in the network would not identify an end-user. And carriers would have the additional difficulty of ensuring that the portion of the header information they provide to law enforcement is limited to the addressing information that they are legally authorized to provide and does not include, for example, addressing or controlling information that is related to information services and therefore is exempt from CALEA's requirements.

Finally, carrier networks are simply not designed to extract header information and supply it to law enforcement. This capability therefore would require manufacturers and carriers to develop and install costly modifications for packet networks, even as this nascent technology is undergoing rapid change.[43] Such modifications would depress development of the technology and be anything but cost-effective.

41/ *Id.* at 30.

42/ TIA Comments at 46.

43/ *See, e.g.*, SBC Comments at 8 (describing how industry is accelerating the processing of data packets and embedding the routing of packets in hardware or firmware).

In short, despite CDT's attempt to make its proposal appear more reasonable, the Commission should, for the time being, refrain from imposing any new regulatory obligations on packet-mode communications. And the Commission should in no event require carriers to separate packet headers from packet content.

III. THE COMMISSION MAY NOT INCLUDE ADDITIONAL CAPABILITIES UNLESS DOJ/FBI CARRIES ITS BURDEN OF PROVING THAT DOING SO WOULD NOT RESULT IN EXCESSIVE COSTS UNDER THE CRITERIA OF SECTION 107(B).

As U S WEST and other carriers explained in their comments, carriers do not possess — and therefore cannot provide — a breakdown of the costs for individual punch list items or other capabilities. Local exchange carriers have provided their best estimates of *overall* CALEA-compliance costs through the United States Telephone Association ("USTA").[44/] In contrast, DOJ/FBI by its own admission possesses the very cost information that the Commission and carriers need to evaluate the individual punch list items under section 107(b)'s factors: the prices that manufacturers plan to charge carriers for those items.[45/] Indeed, where it suits DOJ/FBI's purposes, it relies on that information in its comments. For example, DOJ/FBI contends that, according to undisclosed information provided by manufacturers, the cost to carriers of providing continuity check tone would be "trivial."[46/] The burden therefore remains on DOJ/FBI to present this data in response to the Commission's request for cost information.

44/ *See* USTA Comments at 8.

45/ More specifically, DOJ/FBI asserts that it has only "price" data and not manufacturers' underlying "cost" data. *See* DOJ/FBI Comments at 16. The prices that manufacturers charge, however, will be "costs" for carriers (and ultimately for the public). This data therefore clearly would be useful to the Commission's deliberations, and we refer to DOJ/FBI's data generically as "cost" data.

46/ DOJ/FBI Comments at 64-65.

Yet DOJ/FBI persists in arguing that such cost data are irrelevant because the Commission assertedly lacks power to exclude capabilities on the basis of their cost. DOJ/FBI also contends that, in any event, confidentiality agreements with manufacturers preclude its disclosure of any cost information that might be relevant. Neither argument withstands scrutiny, as we show below.

DOJ/FBI asserts that sections 107(b) (1) and (3) — which require a safe harbor standard to "meet the assistance capability requirements of section 103 by cost-effective methods" and "minimize the cost of such compliance on residential ratepayers" — give the Commission authority to determine the best way for carriers to provide capabilities, but not to *exclude* capabilities altogether. According to DOJ/FBI, carriers can be relieved of section 103(a) compliance costs only through proceedings under section 109(b).

That misreads the statute. First, section 107(b)(1) does not merely ask the Commission to select the *most* cost-effective method of achieving compliance with a capability that will be required under section 103. The section's requirement is absolute: The Commission may promulgate a standard *only if* it is cost-effective;[47] if it is not, the standard may not be adopted. And, plainly, if a particular capability would be *very costly* to implement yet would be of *marginal value* to law enforcement, the capability would not be cost effective.

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[47] Indeed, it is clear that section 107(b) authorizes the Commission to reject capabilities that might otherwise be required under section 103. If a capability does not "protect the privacy and security of communications not authorized to be intercepted," 47 U.S.C. § 1006(b)(2), the Commission must reject it: The statute does not suggest that the Commission would have to adopt the capability anyway and simply modify how it would be implemented. Nothing in the plain language of the statute suggests the type of limited authority DOJ/FBI suggests.

Similarly, section 107(b)(3) must be read to authorize the Commission to exclude capabilities that would be so expensive to implement that the costs would flow through to residential ratepayers. Where, as here, the combined cost of J-STD-025 and the punch list items would far exceed the $500 million set aside for reimbursing carriers for CALEA compliance, the potential effect on ratepayers is enormous. Section 107(b)(3) cannot be read to permit the adoption of a standard that would have such an effect. The Commission should at a minimum defer including those capabilities in its standard until and unless the cost of compliance declines, through innovation, to reasonable levels.

Section 107(b)(4) reinforces the limitations imposed by sections 107(b)(1) and (3): If the Commission concludes that the cost to carriers of complying with the punch list or other disputed capabilities would deter carriers from investing in new technologies or services — as it surely would — the Commission must exclude those capabilities from the standard.[48/]

Even apart from section 107(b), the Commission must consider the cost of compliance in assessing under section 103(a)(2) whether call-identifying information is "reasonably available" to carriers.[49/] The term "reasonably available" is not defined in CALEA or in its legislative history, but the surrounding statutory provisions show how Congress

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48/ DOJ/FBI also is wrong that the Commission may consider only the incremental costs of the punch list capabilities and not the underlying costs of complying with J-STD-025. *See* DOJ/FBI Comments at 17. Section 107 authorizes the Commission to establish a safe harbor standard that carriers may comply with to avoid enforcement liability, and J-STD-025 plainly must be a component of any such standard. Thus, to the extent that cost is relevant to the Commission's analysis under section 107(b), it may consider the cost of the entire standard, including J-STD-025.

49/ *See* FNPRM ¶¶ 25-26; *see also* GTE Comments at 10-12; PCIA Comments at 9-13; SBC Comments at 4-5.

understood "reasonableness" in the context of CALEA.[50] When defining what is "reasonably *achievable*" for carriers in section 109, for example, Congress identified a number of factors for the Commission to consider, and at least four of these directly reflect cost or other financial concerns. *See* 47 U.S.C. § 1008(b)(1)(B), (D), (E), (H). The Commission should consider these factors when determining what is "reasonably available" as well.

Even if DOJ/FBI were correct that the Commission may consider cost information only to determine "*how* the assistance capability requirements are to be met,"[51] DOJ/FBI still would bear the burden of showing that its proposed modifications of J-STD-025 meet the requirements of section 103(a) "by cost-effective methods" and "minimize the cost of compliance on residential ratepayers." As U S WEST showed in its comments, DOJ/FBI has the burdens of both production and persuasion in this proceeding, because it has petitioned the Commission to modify a presumptive safe harbor standard developed by an expert standard-setting organization, and because it — and not carriers — has access to the relevant cost data.[52] DOJ/FBI, however, has yet to demonstrate that any of its specific proposals for modifying J-STD-025 either are cost-effective or would minimize ratepayer costs relative to other methods of satisfying section 103(a).

Finally, DOJ/FBI's claims that it is barred from disclosing the cost data in its possession is without merit. DOJ/FBI states that it received that information "pursuant to non-

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[50] *See* PCIA Comments at 10.

[51] DOJ/FBI Comments at 11; *see also id.* at 12 ("[I]f there is more than one means of complying with CALEA's assistance capability requirements, the Commission may take account of relative costs . . . in choosing among the alternatives.").

[52] *See* U S WEST Comments at 4-7.

disclosure agreements (NDAs) that prohibit the government from disclosing propriety [sic] information" except under limited circumstances.[53] DOJ/FBI has not produced the nondisclosure agreements and simply asserts that none of the excepted circumstances "appears to apply here."[54] The Commission should require DOJ/FBI to produce the agreements so that the Commission and other parties can consider if and how such data might be disclosed. For instance, the NDAs might permit disclosure in response to a formal request by the Commission. In any event, DOJ/FBI could avoid disclosing proprietary information by aggregating its data to create comprehensive, nationwide cost estimates for each of the punch list capabilities.[55] Providing aggregate estimates would not reveal the prices of any individual manufacturer, and it therefore would not raise any competitive concerns or provide carriers with information that they could exploit when they negotiate with manufacturers.[56]

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[53] DOJ/FBI Comments at 16.

[54] *Id.*

[55] *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Report and Order, FCC 98-184, ¶ 46 (rel. Aug. 4, 1998) ("*Confidential Information Order*") ("Parties should also consider the option of presenting information in a manner that reduces or eliminates its commercial sensitivity . . . .").

[56] According to TIA, several manufacturers have voluntarily agreed to provide cost information to the Commission, and TIA requests that this data be treated "with absolute confidentiality." TIA Comments at 7. Manufacturers have legitimate confidentiality concerns about this sensitive information, but interested parties must have some opportunity to review and challenge that data. *See Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n*, 555 F.2d 82, 95 (3d Cir. 1977) (holding that a party submitting confidential information in a rulemaking cannot "deprive other interested parties of the opportunity to challenge it before the agency or upon judicial review"); *see also Confidential Information Order*, at ¶ 44. The Commission therefore should allow such information to be inspected subject to a protective order or fashion some other means of permitting limited review of the data by interested parties.

IV. THE COMMISSION STANDARD SHOULD PROVIDE MANUFACTURERS AND CARRIERS WITH ADEQUATE TIME TO DESIGN, PRODUCE, AND INSTALL SOLUTIONS FOR ANY CAPABILITIES INCLUDED BEYOND THE CORE CAPABILITIES OF J-STD-025.

The comments show that it is not reasonable to expect TIA to revise and complete the standards process after a remand from the Commission within 180 days.[57] As U S WEST noted in its comments, Subcommittee TR45.2 (without any objection from DOJ/FBI representatives) has estimated that the entire process will take 14 to 17 months.[58] Under the most optimistic of assumptions, the Commission can expect Subcommittee TR45.2 to produce only a stable draft of a revised standard within 180 days after the Commission's decision.[59] The Commission therefore should revise accordingly its tentative conclusion that TIA should "complete any such modifications to J-STD-025 within 180 days of release of the Report and Order in this proceeding."[60]

In addition, the Commission should establish a reasonable schedule for carriers to comply with any modifications to J-STD-025. When establishing a safe harbor standard under section 107(b), the Commission must "provide a reasonable time and conditions for compliance with and the transition to" the new standard. 47 U.S.C. § 1006(b)(5). How long carriers will need to comply will depend on when manufacturers are able to provide CALEA solutions, and that in turn will depend on the extent to which the Commission modifies J-STD-025, if at all.

57/ *See* AT&T Comments at 22-23; CTIA Comments at 37-40; TIA Comments at 7-20.

58/ *See* U S WEST Comments at 30-31.

59/ *See* TIA Comments at 15.

60/ FNPRM at ¶ 133.

Therefore, U S WEST cannot project precisely when it will be able to comply with the Commission's safe harbor standard, except to say that it and other large carriers will need from 12 to 18 months to install and test CALEA solutions after those solutions become commercially available. The Commission should adopt a schedule that guarantees carriers this needed time.

The Commission also should not press manufacturers to develop CALEA solutions too quickly. The technical staffs of both manufacturers and carriers are currently spending significant amounts of time working on number portability, E911, Y2K compliance, and CPNI electronic safeguards. Implementing the Commission's CALEA decision will strain those resources even further.[61/] If the Commission's schedule forces manufacturers to develop out-of-cycle switch upgrades, the costs of CALEA compliance could rise significantly.[62/]

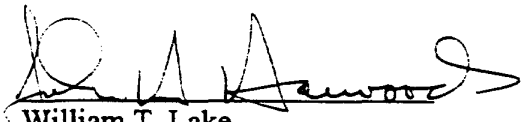
61/ *See* Bell Atlantic Mobile Comments at 14.

62/ *See* PCIA Comments at 12-13.

CONCLUSION

For the foregoing reasons, the Commission should reject the punch list capabilities demanded by DOJ/FBI, as well as the location information and packet-mode communications capabilities included within J-STD-025. If the Commission decides to revise J-STD-025, it should give manufacturers and carriers sufficient time to develop and install solutions based on the Commission's decision.

Respectfully submitted,



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I, Todd Zubler, hereby certify that, on this 27th day of January, 1999, I have caused a copy of the foregoing "Reply of U S WEST, Inc." to be served by hand or by first-class mail, postage prepaid, on each of the parties set forth on the attached service list.

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ATTACHMENT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Communications Assistance for	)	CC Docket No. 97-213
Law Enforcement Act	)	

COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") submits these comments in response to the Public Notice issued by the Office of Engineering and Technology ("OET") on May 7, 1999 regarding revenue estimates submitted by five manufacturers for the implementation of the Communications Assistance for Law Enforcement Act ("CALEA").[1] OET presumably seeks such comments because of arguments by U S WEST and other carriers that the Commission should reject the proposed "punch list" capabilities because they cost too much and therefore fail to satisfy the criteria in section 107(b) of CALEA. Indeed, as carriers have shown, any CALEA costs greater than the $500 million authorized by Congress for CALEA compliance will impose substantial costs on ratepayers and therefore are inconsistent with section 107(b).

The aggregate figures published by OET show that the industrywide cost for less than all carriers to implement J-STD-025 alone would be almost double the $500 million that

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[1] *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Public Notice, DA 99-863 (rel. May 7, 1999) ("*Public Notice*"). On March 2, 1999, OET granted confidential treatment to the data filed by manufacturers. The Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI") have petitioned for reconsideration of that order, *see Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Petition for Reconsideration, filed by DOJ/FBI (Mar. 31, 1999) ("*DOJ/FBI Petition*"), and U S WEST may respond to that petition after notice has been published in the *Federal Register*.

Congress authorized. When *some* of the cost for the punch list items is added in,[2/] the total cost reaches $1.33 billion. Thus, the OET figures by themselves demonstrate that the Commission should not include the punch list capabilities in any standard adopted under section 107(b) of CALEA.

What is more, the aggregate figures compiled by OET appear to understate the overall costs of J-STD-025 and the punch list capabilities by a significant amount. Based on the limited information it has received from manufacturers, the cost figures reported by industry groups, and its internal cost estimates, U S WEST would expect total *industrywide* CALEA compliance costs to be more than the $1.33 billion figure reported by the OET.[3/] The limitations of the data provided by the manufacturers and disclosed by OET point to the same conclusion. For example, OET has data for only five manufacturers, and some or all of the manufacturers excluded important costs:

- None of the manufacturers included *all* of its CALEA-related revenues.
- Some manufacturers did not include estimates for individual punch list and other capabilities.
- Some estimates assumed a "buyout" plan by the government. But there is no assurance that this plan will be implemented.
- Some manufacturers did not include hardware costs.

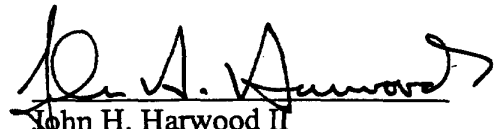
2/ The *Public Notice* states that "not all manufacturers supplied revenue estimates for each punch list capability."

3/ With negotiations ongoing between industry and DOJ/FBI, it is possible that a more flexible and cooperative implementation plan could reduce carrier costs. It is unclear, however, whether those negotiations will be successful and how much such a plan actually would save.

Finally, the manufacturers' figures do not reflect carriers' substantial engineering, installation, and implementation costs.

Because of these limitations, it is difficult to say how much the figures aggregated by OET underestimate total CALEA costs. As DOJ/FBI has argued, the "cost data from the manufacturers can be understood only in light of the assumptions and industry conventions that frame them."[4/] Thus, if the Commission desires more accurate estimates of CALEA costs, it must ask the manufacturers to disclose their data based on standardized assumptions.

Respectfully submitted,



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4/ *DOJ/FBI Petition* at 5.

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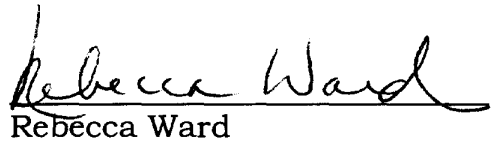
CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on the 23rd day of June, 1999, I have caused a copy of the foregoing **LETTER** to be served, via first class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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